92-770

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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CLARENCE SCHIER, Petitioner

v.

JERRY GOLBERG, doing business as
GOLBERG DAIRY EQUIPMENT
and
DAVID R. LAMBERT.

----------*----------

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

----------*----------

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September 11, 1992

QUESTIONS PRESENTED

1. Did the trial court err in not finding a conversion and in not awarding petitioner treble damages under Indiana law, as well as all other damages allowed under Indiana law since, in the trial court, Defendant GOLBERG, admitted the property was not his, admitted taking the property knowingly and with intent and without consent, admitted not returning the property on petitioner's demand, and admitted that he, Defendant GOLBERG, sold the property without permission, thereby converting to his own use, being the elements of conversion under the Indiana statute?

2. Did the trial court err in its dismissal of petitioner's complaint against defendants LAMBERT and SEPARATORS, INC.?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities.....	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	5
Reasons for Granting the Writ	
1. The Decision of the District Court of Indiana conflicts with the Proper Interpretation and Intent of the Indiana codes providing protection for individuals' property through the codes entitled, "Offenses Against Property; Damages; Costs; Attorney's Fee," "Theft," "Conversion," and "Criminal Trespass.".....	10
2. The Decision of the District Court of Indiana conflicts with the Proper Interpretation and Intent of the Indiana codes providing protection for individuals' property regarding	

Table of Contents (cont)

Page

exercising unauthorized control over property of another..... 13

Conclusion 25

Certificate of Service..... 26

Appendix Index..... 28

Appendix ..... App. 1

TABLE OF AUTHORITIES

CASES

Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, certiorari denied Lin V. American Airlines, Inc., 102 S.Ct. 358, 454 U.S. 878, 70 L.Ed.2d 187..... 10

Beneficial Mortgage Company v. Powers, 550 N.E. 2d 793 (Indiana App. 1 Dist., 1990)..... 18

Foley v. Colby, 266 N.E. 2d 619 (Civ. App. Ind., Div. 2, 1971).... 21

Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E. 2d 92 (Civ. App. Ind., 2 Dist., 1972)..... 21

Jones V. Kilborn, 122 N.E. 2d 739 (Civ. App. Ind., 1954)..... 17

Miller v. Long, 131 N.E. 2d 348 (Civ. App. Ind. 1956)..... 14

Noble v. Moistner, 388 N.E. 2d 620 (Civ. App. Ind. 4th Dist., 1979).. 19

Richardson v. Scroggham, 307 N.E. 2d 80 (Civ. App. Ind., 1st Dist., 1974..... 21

Sikora v. Barney, 207 N.E. 2d 846 (Civ. App. Ind. Div. 2, 1965)... 15,16

Steward v. City of Mount Vernon, 497 N.E. 2d 939, 942 (Indiana App. 1986)..... 19

Tucker v. Capitol City Riggers, 437 N.E. 2d 1048 (Civ. App. Ind., 1 Dist., 1982)..... 17,21

Yeager and Sullivan, Inc. v. Farmers Bank, 317 N.E. 2d 792 (Civ. App. Inc., 2 Dist. 1974).... 16

Yoder Feed Service v. Allied Pullets, Inc., 359 N.E. 2d 602 (Civ. App. Ind., Third Dist, 1977)..... 20

STATUTES

28 U.S.C. Section 1254..... 3

28 U.S.C. Section 1332..... 5

Indiana Code §34-4-30-1.....3,6,13

Indiana Code §35-41-2-2(a)..... 3

Indiana Code §35-41-2-2(b)..... 4

Indiana Code §35-43-1-2..... 6

Indiana Code §35-43-2-2..... 6

Indiana Code §35-43-2-2(a).....4,11

Indiana Code §35-43-4-2..... 6

Indiana Code §35-43-4-2(a).....6,11,12

Indiana Code §35-43-4-3.....5,6,11,12

No. _____

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JERRY GOLBERG, doing business as
GOLBERG DAIRY EQUIPMENT
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----------*----------

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

----------*----------

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, CLARENCE SCHIER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this matter on May 11, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and is printed in Appendix B hereto, infra, page App 82. The judgment of United States District Court for the Southern District of Indiana, Indianapolis Division, is printed in Appendix A hereto, infra, page App 1. The Journal Entry of Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, is printed in Appendix A hereto, infra, page App 3. The Order denying petition for rehearing is printed in Appendix C hereto, infra, page App 107.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit

(Appendix B, infra, page App 82) was entered on May 11, 1992. A timely petition for rehearing was denied on June 15, 1992. (Appendix C, infra, page App 107.) The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 1254: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED

Indiana Code "34-4-30-1:
See Appendix D, page App 112.

Indiana Code §35-41-2-2(a): A person engages "intentionally" in conduct if when the person engages in the conduct it

is his conscious objective to do so. See Appendix D, page App 114.

Indiana Code §35-41-2-2(b): A person "knowingly" engages in conduct if when he engages in the conduct, he is aware of a high probability that he is doing so. See Appendix D, page App 115.

Indiana Code §35-43-2-2(a) titled "Criminal Trespass" reads in part:

> A person who:
> ...(4) knowingly or intentionally interferes with the possession or use of the property of another person without his consent...commits criminal trespass, a Class A misdemeanor.

See Appendix D, page App 119.

Indiana Code §35-43-4-2(a): The relevant part of the statute reads:

> A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

See Appendix D, page App 121.

Indiana Code §35-43-4-3 titled "Conversion" states:

> A person who knowingly or intentionally exerts unauthorized control over the property of another person, commits criminal conversion, a Class A misdemeanor.

See Appendix D, page App 122.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit, #90-2991 and #90-2992, to the Supreme Court of the United States.

Federal jurisdiction for the filing of this case was established on diversity of citizenship and the amount of the claim under 28 U.S.C., Section 1332.

The Plaintiff filed his Complaint in two counts in the United States District Court, Southern District of Indiana, Indianapolis Division, Case No. 88 C 210,

against Defendants JERRY GOLBERG d/b/a GOLBERG DAIRY EQUIPMENT, SEPARATORS, INC. and DAVID R. LAMBERT. Count one stated a claim for tortious conversion, alleging Defendants converted Plaintiff's property to their own use. In Count Two, Plaintiff asserts that he is entitled to treble damages pursuant to Indiana Code §34-4-30-1, because the defendants committed the following criminal acts: (1) criminal conversion [IC § 35-43-4-3], (2) criminal mischief [IC § 35-43-1-2], (3) criminal trespass [IC § 35-43-2-2], and (4) theft/receipt of stolen property [IC §35-43-4-2].

Defendant GOLBERG filed a counter-claim alleging that Plaintiff owed him money on numerous other deals.

The trial was had before the Court on the 21st and 22nd day of February, 1990.

SEPARATORS, INC. and DAVID R. LAMBERT were dismissed from the case at conclusion of Plaintiff's case in chief.

The Court found: (1) on the Plaintiff's claims against the Defendant, judgment should be entered in favor of the defendant; (2) on the Defendant's counterclaim against the Plaintiff, judgment should be entered in favor of the Plaintiff.

Timely appeal was made to the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on September 4, 1990, Case #90-2991, and amended on September 5, 1990, Case #90-2992. The United States Court of Appeals handed down its decision on May 11, 1992, upholding the lower court's decision. See Order dated May 11, 1992, in the Appendix attached hereto at page App 82.

Petitioner's petition for rehearing was timely filed on the 23rd day of May, 1992, with the United States Court of Appeals. The United States Court of Appeals denied the petition for rehearing on June 15, 1992. See Order, dated June 15, 1992, in the Appendix at page App 107.

The pertinent sequence of events are as follows:

Petitioner, SCHIER, had obtained a separator from one of his clients and had become liable to that client for payment of same. Petitioner wanted to sell said property for a profit. Petitioner had stored said separator at the business place of another person who is not involved in this lawsuit. GOLBERG went to that person's place of business without petitioner's permission and

without petitioner being present and lied to the person storing said property in order to get possession of said property. GOLBERG then took the property and sold it to LAMBERT without petitioner's permission. While the separator was in LAMBERT'S possession, the petitioner gave notice to both GOLBERG and LAMBERT that there was no sale and that GOLBERG did not have authority to sell the separator to LAMBERT. Both GOLBERG and LAMBERT refused to return said property, LAMBERT paid GOLBERG for the property and turned around and resold it to another party for a substantial profit. The petitioner never received any money for the sale of this separator.

Petitioner appealed his case through the proper channels in the Federal courts and now brings his case to this Honorable

Court on a writ of certiorari.

REASONS FOR GRANTING WRIT

1. **The decision of the District Court of Indiana conflicts with the Proper Interpretation and Intent of the Indiana codes providing protection for individuals' property through the codes entitled, "Offenses Against Property; Damages; Costs; Attorney's Fee," "Theft," "Conversion," and "Criminal Trespass."**

All the elements of a conversion by defendants having been proved under the statutory law of the State of Indiana, the trial court erred in not awarding petitioner treble damages, costs and attorney's fees as provided by the applicable Indiana statute.

In Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, Lin v. American Airlines, Inc., 102 S.Ct. 358, 454 U.S. 878, 70 L.Ed.2d 187, the United States Supreme Court held that

a federal court considering a case arising under the state law should apply the measure of damages of that state including the statutory penalties.

The pertinent Indiana statutes provide that:

> A person who:
> ...(4) knowingly or intentionally interferes with the possession or use of the property of another person without his consent...commits criminal trespass, a Class A misdemeanor. [IC §35-43-2-2(a)]
>
> A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony. [IC §35-43-4-2(a)]
>
> A person who knowingly or intentionally exerts unauthorized control over the property of another person, commits criminal conversion, a Class A misdemeanor. [IC§35-43-4-3]

In the instant case, all essential events transpired in the State of Indiana. Petitioner had title to the

cream separator property in question. Defendant, without title and without permission from petitioner, knowingly and with intent took possession of the property and sold it to a third party and intentionally kept the money for himself without voluntarily disclosing the taking and sale. (Indiana Code IC 35-43-4-2(a) titled "Theft") Upon learning that defendant took the property, petitioner demanded return of the property, but defendant refused, though defendant admitted that the property was not his. Thus, under Indiana statutory law defendant converted said property to his own use having knowingly or intentionally exerted unauthorized control over the property of petitioner with intent to deprive the petitioner of any part of its value or use. (Indiana Code IC 35-43-4-3

titled "conversion")

Therefore, defendant, by Indiana law (Indiana Code IC 34-4-30-1 titled "Offenses Against Property; Damages; Costs; Attorney fee"), is liable to petitioner for (1) treble actual damages (2) costs of the civil action (3) reasonable attorney fees, as well as other reasonable costs of collection.

The trial court erred in finding as a matter of law there was no conversion by defendant, thereby depriving petitioner of a considerable sum of recovery even after any off-sets.

2. The decision of the District Court of Indiana conflicts with the Proper Interpretation and Intent of the Indiana codes providing protection for individuals' property regarding exercising unauthorized control over property of another.

The Trial Court Incorrectly Applied

the Laws of the State of Indiana and the Appellate Court Incorrectly Affirmed.

These cases are going to be discussed very briefly, setting out the points of law for which they stand. This case law is pertinent to both questions 1 and 2 presented herein in that GOLBERG and LAMBERT were working in collaboration with one another against SCHIER.

Miller v. Long, 131 N.E. 2d 348, (Civ. App. Ind. 1956), held: (1) the exercise by third persons of dominion over property to the exclusion of and in defiance of the owner's rights therein equals tortious conversion and the most common illustration of this is the case of a sale and delivery of goods made without authority of the owner. (2) Plaintiff is not legally bound to negotiate for his property as a condition

precedent to action against defendants for conversion. (3) A principal is liable to third persons for torts committed by its agent while acting within the course and scope of his employment. (4) Damages for conversion is the value of the converted property at the time of the conversion with interest thereon plus recovery for any injury proximately resulting from the conversion. (5) Whether title passes depends on the intention of the parties not mere possession thereof.

Sikora v. Barney, 207 N.E. 2d 846 (Civ. App. Ind. Div. 2, 1965), defined conversion as the exercise of dominion over personal property to the exclusion and in defiance of the rights of the owner or withholding it from his lawful possession under claim of title

inconsistent with the owner, i.e., once the demand is made and in turn refused, there is a withholding from lawful possession. Sikora defined "fair market value" as a measure of damages, and defined it as the price at which a willing seller and a willing buyer will trade.

Yeager and Sullivan, Inc. v. Farmers Bank, 317 N.E. 2d 792 (Civ. App. Ind., 2 Dist. 1974) held that in order for a converter to mitigate damages for conversion by establishing application of converted property to the benefit of the injured party by payment of debt, the benefit must be an application of the converted proceeds to the specific debt which the proceeds were intended to discharge, i.e., the specific debt related to that transaction; this was not

done in SCHIER'S case.

Jones v. Kilborn, 122 N.E. 2d 739 (Civ. App. Ind., 1954), states the proposition that possession of a piece of property for purposes of demonstrating it and contracting for its sale does not automatically give carte blanche for said sale even if possession was authorized by the owner. Further, a purchaser who, with notice, makes payment to an agent who is without authority to receive such payment, makes that individual his own agent for the purposes of transmitting payment to the seller, and seller is not bound thereby until payment is received by him. It is uncontroverted that SCHIER never received any of the proceeds of the sale, and they could not be applied legally to any other debt.

Tucker v. Capitol City Riggers, 437 N.E. 2d 1048 (Civ. App. Ind., 1 Dist.,

1982), (1) held that if demand is necessary at all it is a simple demand, but further, no demand is necessary when a defendant assumes a position indicating that a demand would be unavailing. Both LAMBERT and GOLBERG refused to return the property, therefore further demands were unnecessary. (2) It is unlawful to seize the property of another without legal process, lien, or agreement, and hold it until a debt is paid -- these actions clearly amount to trover and conversion. GOLBERG held the proceeds of the sale for unrelated debts which he alleged were owed by SCHIER.

Beneficial Mortgage Company v. Powers, 550 N.E. 2d 793 (Indiana App. 1 Dist., 1990), held ratification (the lower court called this acquiescence on SCHIER'S part) does not occur unless it

appears that the act was performed for and on the behalf of another and not on account of the actor himself. Although one may ratify another's unauthorized acts through silence and acceptance of benefits there must be full knowledge of all material facts on the part of the known actor. Petitioner had none of the facts.

Steward v. City of Mount Vernon, 497 N.E. 2d 939, 942 (Indiana App. 1986), if an agent is not acting in good faith and with due care, he may be held liable to his principal for losses sustained. If GOLBERG was an agent at all, he did not act in good faith or with due care.

Noble v. Moistner, 388 N.E. 2d 620 (Civ. App. Ind. 4th Dist., 1979), held that the essential element to be proved by the plaintiff is an immediate, unqualified right to possession resting

on superior claim of title. The Trial Court did rule in favor this one time in Conclusion of Law no. 10 in stating SCHIER did have superior claim of title to the property. This case also held that there is a conversion if there is a withholding of the possession of property, even if it was acquired peacefully. GOLBERG lied to get peaceable possession of this property, however, he did not come by it legally. GOLBERG refused its return after proper demand.

Yoder Feed Service v. Allied Pullets, Inc., 359 N.E. 2d 602 (Civ. App. Ind., Third Dist. 1977), simple demand is all that is necessary; in this case, all it amounted to was a simple phone call. The case further indicates that Indiana courts regularly allow punitive damages

in ordinary conversion cases, i.e., plaintiff is entitled to treble damages (punitive damages) which is authorized by Indiana Code, Section 34-4-30-1.

Foley v. Colby, 266 N.E. 2d 619 (Civ. App. Ind., Div. 2, 1971), again simple demand and subsequent withholding of the property is all that is necessary to establish conversion.

Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E. 2d 92 (Civ. App. Ind., 2 Dist., 1972), Indiana Courts allow punitive damages in conversion cases. Plaintiffs are entitled to the property back if it is available, even if it is in an enhanced state.

Richardson v. Scroggham, 307 N.E. 2d 80 (Civ. App. Ind., 1st Dist., 1974), Indiana Courts allow punitive damages.

The Tucker Court talks about replevin

and conversion in the same breath and in the same context. In both causes of action the issues are 1) rightful title, and 2) either return of the property or the value thereof. In the case at bar, the lower Court ruled that defendant LAMBERT had not committed conversion under the laws of the State of Indiana and therefore dismissed him and his company from the lawsuit. The Court incorrectly applied the laws of the State of Indiana. It reasons that if plaintiff had brought his action under replevin, he may have had a claim against MR. LAMBERT. However, the case law indicates that replevin and conversion are almost identical and in both causes of action the issues are 1) rightful title and 2) either return of the property or the value thereof. LAMBERT did exercise

unauthorized control over the property of another person after he had been put on notice that GOLBERG did not have authority to sell the property and at a time when the property was still in LAMBERT'S possession and had not been sold by him. The petitioner, SCHIER, gave LAMBERT said notice on July 8 in demand for return of his property. LAMBERT did not invoice the property until July 9th. Therefore the Court incorrectly applied the laws of the State of Indiana.

Under the facts of the case and the status of the law at the time of trial, it is clear that both GOLBERG and LAMBERT exercised unauthorized control over property of another and sold it without his permission. This was done even after

proper demand was made for the property. Therefore, both GOLBERG and LAMBERT are liable to SCHIER for damages which he sustained.

Testimony shows that petitioner proved by a preponderance of evidence that LAMBERT and SEPARATORS, INC. (1) knew at some point before alteration/ enhancement was made to the 314 separator and before a final sale was made to a third party that the 314 did not belong to GOLBERG; (2) knew GOLBERG was not authorized to sell it; (3) exerted unauthorized control over the 314; (4) knew the 314 had allegedly been stolen; (5) intentionally interfered with petitioner's use or possession of the 314; (6) knowingly or intentionally caused petitioner to suffer pecuniary loss.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 1992

CERTIFICATE OF SERVICE

I, Richard C. White, a member of the Bar of the Supreme Court of the United States and counsel of record for Clarence Schier, petitioner herein, hereby certify that on September 14, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Jerry Golberg, defendant herein, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed to the post office address of David E. Wright and Ronald G. Sentman, the above-named defendant's counsels of record, at JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH, 1800 INB National Bank Tower, One Indiana Square, Indianapolis,

Indiana 46204.

On David R. Lambert, defendant herein, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed to the post office address of David E. Wright and Ronald G. Sentman, the above-named defendant's counsels of record, at JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH, 1800 INB National Bank Tower, One Indiana Square, Indianapolis, Indiana 46204.

All parties required to be served have been served.

Dated September 14, 1992.

Richard C. White

RICHARD C. WHITE
1122 First City Bank Bldg.
El Paso, TX 79901

CERTIFICATE OF SERVICE OF REBOUND PETITION

I, Richard C. White, a member of the Bar of the Supreme Court of the United States and counsel of record for Clarence Schier, petitioner herein, hereby certify that on October 23, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the rebound Petition for Writ of Certiorari on each of the parties herein, as follows:

On Jerry Golberg, defendant herein, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed to the post office address of David E. Wright and Ronald G. Sentman, the above-named defendant's counsels of record, at JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH, 1800 INB National Bank Tower, One Indiana Square, Indianapolis,

Indiana 46204;

On David R. Lambert, defendant herein, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed to the post office address of David E. Wright and Ronald G. Sentman, the above-named defendant's counsels of record, at JOHNSON, SMITH, DENSBORN, WRIGHT & HEATH, 1800 INB National Bank Tower, One Indiana Square, Indianapolis, Indiana 46204.

All parties required to be served have been served.

Dated October 23, 1992.

RICHARD C. WHITE
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El Paso, TX 79901

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

APPENDIX INDEX

Appendix A

Judgment of Trial Court..... App.1

Appendix B

Opinion of the United States Court of Appeals for the Seventh Circuit..... App. 82

Appendix C

Order Denying Rehearing..... App. 107

Appendix D

Indiana Statutes..... App. 108

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CLARENCE SCHIER,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	CAUSE NO.
JERRY GOLBERG d/b/a GOLBERG DAIRY EQUIPMENT, SEPARATORS, INC., and DAVID R. LAMBERT,	§	IP88-210C
	§	
	§	
	§	
	§	
Defendants.	§	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this date, JUDGMENT is hereby ENTERED for the defendant, Jerry Golberg d/b/a Golberg Dairy Equipment, and against plaintiff, Clarence Schier, on the plaintiff's claims against the defendant. JUDGMENT is also ENTERED for the plaintiff and against the defendant on the defendant's counterclaim against the plaintiff. Each

party is to bear his own costs.

It is so ORDERED this 1st day of August, 1990.

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CLARENCE SCHIER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP88-210C
	)	
JERRY GOLBERG d/b/a GOLBERG DAIRY EQUIPMENT, SEPARATORS, INC. and DAVID R. LAMBERT,	)	
	)	
Defendants.	)	

ENTRY

This matter is before the court for judgment and findings of fact and conclusions of law in accordance therewith following a two-day trial to the court on February 21 and 22, 1990. At the close of the plaintiff's case-in-chief, the court granted the motion of defendants Separators, Inc.

("Separators") and David R. Lambert to dismiss the plaintiff's claims against them. At the close of all the evidence, the court also granted the plaintiff's motion to dismiss the claims of Separators and Lambert against him. It also took under advisement defendant Jerry Golberg's motion to dismiss Count II of plaintiff's complaint. The court, having considered the evidence adduced at trial as well as the briefs and arguments of counsel, hereby finds the following: (1) on the plaintiff's claims against the defendant, judgment should be entered in favor of the defendant; (2) on the defendant's counter-claim against the plaintiff, judgment should be entered in favor of the plaintiff. In accordance therewith, the court enters the following facts and conclusions of law.

Findings of Fact

1. Plaintiff, Clarence Schier, is a citizen of Texas residing at 8512 Whitus Drive, El Paso, Texas. He is engaged as a sole proprietor in the business of rigging, buying, trading and selling used dairy and related equipment under the name of "Better Used Equipment."

2. Defendant, Jerry Golberg, is a citizen of North Dakota residing in Medora, North Dakota. He is engaged as a sole proprietor in the business of rigging, buying, trading and selling used dairy and related equipment under the name of "Golberg Dairy Equipment."

3. Separators is a corporation located at 747 East Sumner Avenue, Indianapolis, Indiana that buys,

rebuilds, repairs, refurbishes and sells used dairy and related equipment.

4. David R. Lambert is President of Separators.

5. Equipment Engineering, Inc. ("Equipment Engineering") is an Indiana corporation engaged in the business of refurbishing used dairy equipment for resale.

6. Schier and Golberg met in 1982 or 1983.[1] Sometime after their first meeting, the two men began to engage in

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[1]In contrast to Schier's testimony that he met Golberg in 1982, Golberg stated that they met in 1983. This discrepancy, although immaterial to the outcome of this lawsuit, marks the first of many conflicts in Golberg's and Schier's testimony.

frequent business transactions. Golberg testified that they participated in approximately ten to fifteen transactions per year from 1983 until September 1987. Schier testified that after they met, at least twenty-five percent of his annual business was conducted with Golberg.

7. Schier and Golberg typically sold, traded or purchased equipment from each other. They also entered into joint ventures in which they would purchase equipment, locate buyers, sell equipment and divide the profits or the remaining equipment. Most of the terms of these transactions were determined on an ad hoc basis without clearly memorializing any of the terms in writing.

8. Although Schier characterized each transaction as separate, he

testified that he and Golberg were involved in more than one transaction at one time and that some deals overlapped or carried over into a subsequent deal in terms of financing and payment. Ordinarily, Schier kept a running balance of amounts they owed each other on specific deals and when the transaction was concluded, they would distribute profits and settle accounts. Schier admitted, however, that sometimes he was not sure how much he and Golberg owed each other. He also admitted that their failure to balance out amounts owing to each other was a "weak spot" in their business relationship. Golberg also admitted that although he kept his checks and a notebook to record business transactions,[2] he did not keep very

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[2] Exhibit A is Golberg's notebook,

accurate records of his business dealings with Schier.

9. The court finds that the testimony of Schier and Golberg to be equally credible. At no time during the proceedings was either party more credible than the other. Although both suffered from lapses of memory regarding the details or existence of certain transactions and did not have additional reliable evidence to refresh their recollections or support their testimony, neither exhibited any clear motivation to

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where he recorded some of the transactions in which he and Schier were involved. Because the notebook is admittedly incomplete, somewhat confusing and unsupported by corroborating evidence other than Golberg's testimony, it has little probative value. In short, the notebook is merely reflective of Golberg's testimony and no more reliable.

misrepresent facts. Because neither man was more believable than the other, the court is repeatedly confronted with varying accounts that are equally credible and lacking in corroboration by other probative evidence. Thus, where Schier's and Golberg's testimony conflicts in relevant part, such testimony will be set forth. The effect of this will be discussed in the "Conclusions of Law" portion of this entry.

The "Separator" Transaction

10. In early 1987, Schier permitted Golberg to pick up a "Model 13004" separator from Equipment Engineering, which Golberg had previously sold to Schier and for which Schier had not yet

paid.[3]

11. In February 1987, Schier acquired a "Model 314" cream separator ("separator") from Western General Dairies, Inc., ("Western General") of Ogdon, Utah.

12. On March 3, 1987, Schier transported the separator to Equipment Engineering in Indianapolis, Indiana at his own expense for inspection by Equipment Engineering who was interested in possibly purchasing the separator for the purpose of reselling it to a third

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[3] This is not the same separator which is the subject of the plaintiff's claims against the defendant. This transaction is relevant to and indicative of the parties course of dealing and Golberg's belief that he was authorized to remove the Model 314 separator from the premises of Equipment Engineering.

party. Some additional pieces of the separator were shipped in April 1987.

13. In April 1987, Equipment Engineering inspected the equipment and discovered that the separator was smaller than expected. As a result, Equipment Engineering elected not to buy the machine.

14. Although Equipment Engineering decided not to buy the separator, it permitted Schier to keep the equipment on the premises until June 1987 while he tried to find another buyer.

15. Schier then placed advertisements for the sale of the separator in the Cheese Reporter on June 12 and 19, 1987.

16. Between April and June 1987, Schier and Golberg discussed the sale of the separator at least five or six times. Schier informed Golberg that he needed to sell the machine. In June 1987, they discussed $22,000 to $24,000 as a possible sales price. During this period, Schier and Golberg were involved in other transactions and talked approximately two to three times a week.

Golberg testified that during these discussions, he told Schier that he could sell the machine to Separators for approximately $22,000 to $25,000. He also stated that he wanted to make a $3,000 commission. According to Golberg, Schier agreed to the sales commission. In another discussion prior to June 23, 1987, Golberg asked Schier if he could transport the separator from Equipment

Engineering to Separators; Schier consented. Golberg testified that he assume that Schier owned the machine and that he had the right to sell it. Schier denied that they ever entered into such an agreement.

17. On June 23, 1987, Golberg removed the machine from the premises of Equipment Engineering and delivered it to Separators. While at Equipment Engineering, Robert Behrens questioned Golberg about the destination of the machine. Golberg told Behrens that the machine was being sent to a company in Wisconsin rather than to Separators. At trial, Golberg explained that he lied to Behrens because he knew that Behrens and Lambert had a bad relationship. That evening Golberg reported to Schier in a telephone conversation that he had

transported the machine to Separators; however, he did not tell him that he had received money from Lambert for the purchase of the machine.[4]

18. Schier testified that he never gave Golberg permission to remove the separator from Equipment Engineering.

19. Upon receipt of delivery of the separator, Lambert, on behalf of Separators, paid Golberg twenty-four thousand dollars ($24,000).

20. On June 23, 1987, the fair market value of the equipment was

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[4] Schier agreed that Golberg informed him that the separator had been moved to Separators; however, Schier did not specify exactly when Golberg disclosed this information other than to say that he learned of the move some time between June 23 and June 28, 1987. A determination of exactly when Schier first learned of the move is not material to the outcome of the case.

approximately $25,000 or less, before being refurbished. This figure is based on the amount paid by Schier to Western General that was attributable to the separator, the sales price of the machine when sold to Separators and Robert Behren's deposition testimony that the separator was worth a figure "plus or minus in the $30,000 range." See Behren's deposition at 11.[5]

21. Golberg testified that at the time he sold the machine to Separators,

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[5] Because fair market value is determined at the time of the alleged conversion, Schier's attempt to attach a fair market value of $78,500 is misplaced. See Yoder Feed Service v. Allied Pullets, Inc., 171 Ind. App. 668, 359 N.E.2d 602, 607 (1977). This figure represents the value after restoration by Separators, which occurred long after the Golberg allegedly converted the property.

Schier owed him approximately $40,000 to $50,000 stemming from other transactions. Schier denied this, testifying that as of June 23, 1987, Golberg probably owed him money.[6]

22. On June 28, 1987, while Schier and Golberg were traveling from New York to New Jersey, Golberg restated that he had taken the separator to Separators for purchase. According to Schier, Golberg also told him that Lambert wanted to inspect the machine before deciding whether to purchase it and that Lambert

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[6] The court notes that it is virtually impossible to determine who owed how much to whom on June 23, 1987 because both Schier and Golberg are equally credible and neither party proffered documentation of any other type of probative evidence to corroborate his testimony.

had not made a firm offer.

In their travels together for the next few days, the two men talked extensively about the separator. Schier testified that he told Golberg that the machine was owned by people in Utah and that he was unsure of how much they would accept for the equipment. He suggested that he and Golberg could possibly reduce the price by trading other equipment. Schier testified that although he discussed many options with Golberg, he made no commitments nor did he agree to pursue this sale as a joint venture. Further, it was Schier's understanding that no sale had been made with Separators and that he could pick up the machine from Separators if he so desired. In contrast, Golberg testified that prior to June 23, 1987, Schier

authorized Golberg to move the machine and sell it for approximately $22,000 to $25,000.

23. Schier testified that on July 1, 1987, he decided to purchase the separator himself.[7] He asked Vaughn Neilson, of Western General if he would accept $25,000 for the separator, which he agreed to do. However, as a condition of the purchase, Schier was also required to purchase for $8,800 an old Excello machine of which he had previously taken possession. Although Schier considered

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[7] Schier's testimony about the method of payment for the separator is confusing. First, he testified about making a down payment of $12,000 to Western General. He then testified that he borrowed $18,000 on July 2, 1987 from Frank Thomas to buy the separator; he told Golberg that Thomas had a lien on the machine.

the Excello machine to be worthless, he agreed.[8]

24. Schier testified that between July 1 and 8, 1987, he told Golberg that Neilson was willing to sell the separator for $25,000, conditioned on resolving the Excello deal. According to Schier, Golberg assured him that no deal had been made with Lambert and that the machine could be picked up any time from Separators.

25. On July 8, 1987, Schier went to

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[8] On July 10, 1987, Schier met with Neilson in Utah and completed the transaction. Schier testified that he considered the sales price of the separator to be $33,897.00, rather than $25,000, because the sale of the separator was conditioned on the purchase of the worthless Excello machine for $8,800.

Separators to retrieve the separator and return it to Equipment Engineering. When he arrived at Separators, Schier informed an employee that he was there to pick up the equipment. When David Lambert materialized, Schier explained the reason for his visit, whereupon Lambert told Schier that Separators had already purchased the separator and had resold it to a third party. Lambert refused to return the equipment.

Lambert and Schier then called Golberg by telephone. Using a speaker phone, Schier announced that he was not going to sell the machine to Separators. Lambert then stated that he had already purchased the separator from Golberg. Lambert told Golberg that the machine had been sold to a third party and Separators was not going to return it. According to

Schier, Golberg simply responded, "What are we going to do if the machine has been sold?" Schier testified that Golberg never admitted that he had already sold the separator to Separators. In contrast, Golberg testified that during the phone conversation, he told Schier that he already sold the separator to Lambert for $24,000. Golberg reminded Schier that he had given Golberg permission to sell the machine. Because everyone was upset, Golberg advised Schier to call him the next say [sic] which Schier failed to do.

After terminating the phone call, Schier continued to discuss the situation with Lambert. Schier again told Lambert that he was not going to sell the machine

to him.[9] As proof that he had already purchased the equipment from Golberg, Lambert waved a piece of paper in front of Schier. Schier explained to Lambert that he had never sold the machine to Golberg and that it was necessary for Lambert to relinquish possession. Upon Lambert's refusal, Schier left.

26. After July 8, 1987, Schier had no further contact with Lambert. Schier explained that he was concerned about pressuring Lambert because he thought Lambert might "hurt" him. Instead, he decided to rely on Golberg to retrieve the machine. He also stated that he waited to make further demands for the

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[9] Schier's reluctance to sell the machine to Separators stemmed at least in part from his negative feelings about Lambert with whom he had never had a good working relationship.

machine because he knew that Separators planned to refurbish the machine and he wanted to strengthen his bargaining position.

27. On July 10, 1987, after receiving the money from Lambert for the purchase of the separator, Golberg credited Schier's account for $21,000, keeping $3,000 as commission for his participation in the sale. Golberg did not consult with Schier before doing this nor did he inform Schier of his actions. This was not unusual, testified Golberg, because in the past Schier and Golberg often paid commissions to each other and Schier had previously allowed Golberg to retain part of the sales price as a commission.

28. Between July 8, 1987 and

December 1987, Schier and Golberg continued to do business with each other and travelled together frequently. Some time during this period Schier asked Golberg to reclaim the separator, which Golberg did not do. In late December 1987,[10] they met on two occasions at Golberg's hotel room in Fort Worth, Texas to discuss the separator. Golberg and Schier have different versions of what occurred at these meetings.

Schier testified that at the first meeting, Golberg admitted for the first time that he sold the separator to Lambert for $24,000. Schier asked him

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[10] Schier testified that they met on December 23 and 28, 1987. Golberg recalled that they met on approximately December 20 and 21, 1987.

why he sold it for so little, especially since Schier had invested $35,000 in the machine. Golberg explained that this was the only deal he could make. Golberg also admitted that he sold the separator long before this meeting. Schier became angry and left. He returned on December 28, 1987, bringing with him some handwritten notes concerning what occurred with regard to the separator and asked Golberg if this comported with his recollection. Golberg agreed. Schier also asked him about what happened to the money he received from Separators. Golberg responded that he no longer had the money. Golberg never offered to give Schier any of the money he received nor did he admit that he owed anything to Schier. Schier also denied owing Golberg any money at that time. Unable to reach a settlement, Schier left.

In contract, Golberg testified that between July 8, 1987 and January 1988, he told Schier at least six to eight times that he sold the machine to Separators for $24,000. According to Golberg, at their December meeting, Schier stated that he wanted to "settle up" on the separator. When Golberg opined that Schier owed him a significant amount of money with regard to other transactions, Schier disagreed and left. Schier returned the next day and told Golberg that Frank Thomas had a lien on the separator and that Schier was desperate for money. Golberg remarked that he felt bad about the situation. He also said that although he did not owe Schier any money, he would give Schier $20,000 in two weeks to settle their accounts and resolve the situation, at which point they would cease doing business together.

Schier declined Golberg's offer and apparently left.

29. Unable to resolve the situation with Golberg, Schier attempted to retrieve the separator from Sargento Cheese, Mitchell Division ("Mitchell"), the company that purchased the machine from Separators after it had been refurbished. Schier went to Mitchell Cheese in Milwaukee, Wisconsin four times in December 1987 and January 1988 in an attempt to retrieve the separator. Schier proposed that Mitchell enter into an agreement with Equipment Engineering to lease equipment to replace the separator at least until the dispute involving the separator was resolved. Mitchell rejected this proposal. Once Schier travelled to Mitchell and attempted to take the separator, but was

prevented from doing so when Mitchell called the sheriff. Schier never regained possession of the separator.

Other Transactions

30. Golberg testified that on November 20, 1983, he loaned $1,050 to Schier. See Exhibit B (a canceled check from Golberg to Schier for $1,050). Schier denied that Golberg loaned $1,050 to him, explaining that the check was a refund relating to a transaction in which Schier overpaid Golberg for three small processing tanks that Schier had previously bought from Golberg and resold to a third party. ("Loan").[11]

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[11] Because so many transactions are involved in this lawsuit, each transaction is given a short name for

31. Golberg testified that on December 24, 1983, he loaned Schier $1,000 for an airline ticket to San Salvador where Schier was conducting a coffee deal. Schier denied that he ever received money to go to San Salvador. He further stated that he never saw Exhibit C, a check made out to Schier by Golberg, and that the endorsement on the check is a forgery. Schier's testimony is rebutted, however, by his own deposition wherein he admitted that Golberg loaned him money in 1983 to assist him in a coffee deal in which he was involved at the time. See April 4 and 5, 1989 Schier

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easy reference later in this entry. Many of the titles bear little or no obvious relation to the transaction; however, because the parties commonly referred to these transactions by such names, the court will do likewise for the sake of consistency.

deposition at 10-11. ("Coffee Loan").

32. Between January 20, 1984 and January 20, 1985, Golberg testified that he and Schier were involved in a transaction resulting in a debt to Golberg for $10,000. According to Golberg, he purchased a sweet water tank and boiler for $6,000, which he sold to Schier. He testified that the purchase price of the equipment, including storage costs, was $8,000. Golberg also charged Schier $2,000 for the cost of moving the equipment. See Exhibit AA (canceled check written by Golberg to State Bank of Independence reflecting his original purchase of the machine).[12] Golberg

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[12] Although this exhibit reflects a purchase by Golberg, it fails to prove or corroborate Golberg's testimony that Schier owes him money.

testified that Schier took the equipment but never repaid him.

Schier disputes Golberg's version of what occurred. According to Schier, he and Golberg ordered equipment from a plant in Green Bay, which they promised to resell to a third party. Before he and Golberg could pick up the equipment, it was sold to someone else, leaving Schier and Golberg with an order for equipment they were unable to fill. To satisfy their own customer, Schier and Golberg sold different equipment located by Schier. According to Schier, he never received any money or equipment from Golberg; thus he owes Golberg nothing. Even if he did, Schier maintains that the amounts quoted by Golberg (i.e., $8,000 for equipment and storage, $2,000 for freight) were inflated. ("Strum

Equipment and Freight Transaction").

33. Between March 16, 1984 to April 3, 1986, Schier and Golberg engaged in a transaction with Evon Belliard involving the sale of numerous pieces of equipment. After Belliard placed an order for equipment with Schier, Schier asked Golberg if he was interested in assisting him in locating and shipping equipment that Schier did not have or could not find. Golberg agreed. Exhibit LL is a list of equipment purchased by Belliard and the sales prices of the equipment. Mr. Belliard made several payments for the equipment to Schier and Golberg, totalling $182,191.22.[13]

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[13] This amount also includes a payment of $5,000 to Acme Equipment Corp. for the purchase of two crystallizers.

Although neither Schier nor Golberg invested any cash in the transaction, both supplied or located the necessary equipment. Exhibit VVVV sets forth Golberg's summary of the capital contributions made by him and Schier, his calculations of total gain, distribution of gain and adjustments of receipts, with the net result being that Schier owed him $38,279.89, which he never repaid.[14]

Schier's version of what transpired differs from what is reflected in Exhibit VVVV. Schier first testified that he, not

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[14] With the alterations made by Golberg at trial, Exhibit VVVV is an accurate reflection of Golberg's testimony regarding the Belliard transaction. The court hereby incorporates it as reflective of Golberg's testimony; therefore, it is unnecessary to recount all the details contained in the document.

Golberg, supplied the two 500 gallon processors.[15] Second, because the crystallizers had already been purchased by Schier and Golberg, Golberg improperly directed Belliard to send $5,000 to Acme as partial payment for the crystallizers. According to Schier, Golberg should not have included $2,500 as a benefit to Schier derived from the Belliard payment because only Golberg received any benefit. Schier testified that Golberg now owes him the $2,500 he wrongly attributed as a benefit to Schier. Third, Schier contributed approximately $20,000 worth of equipment in addition to the equipment supplied by him as part of

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[15] Golberg testified that he provided the two processors and such testimony is reflected in Part II., Section A of Exhibit VVVV.

the joint venture with Golberg. Equipment supplied from his inventory was sold for approximately $32,000.[16] The value of the property located by Schier and Golberg collectively amounted to approximately $150,000. The profit derived from their joint venture was forty-percent of the $150,000, or $60,000 which they split evenly. According to Schier, at the conclusion of the transaction, Schier owed Golberg $6,250 for his share of the purchase of the crystallizers, which he paid by sending Golberg a cashier's check. See

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[16] Whether this is the same equipment that was valued at $20,000 is unclear from Schier's testimony.

Plaintiff's Exhibit Nine.[17] In fact, Schier opined that Golberg owes $2,500. ("Belliard Transaction").

34. On May 7, 1984, Golberg financed the purchase of equipment from Rabin

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[17] Golberg recalled cashing this check and taking the money; however, he did not remember the purpose for which it was written. He mentioned that the check correlated in some way with a check he wrote to Schier ten days later for $6,000. In addition, Schier and Golberg disagree about the details of the purchase of the crystallizers. Golberg testified that they were purchased for $11,200. Schier stated that they were bought for $10,300.

It is not surprising that Schier and Golberg disagree about the details and course of events related to this transaction because neither Schier nor Golberg kept accurate and complete records of their transactions with each other. Indeed, because they relied primarily on their memories to keep track of this complex transaction, Schier and Golberg should have anticipated the very problems that have surfaced in this lawsuit.

Brothers Auctioneers, investing approximately $31,150. See Exhibit I.[18] Approximately $6,000 worth of equipment was shipped to Myer dairy in Kansas. Golberg testified that this equipment was shipped on behalf of Schier, who did not repay him. Schier testified that the equipment was shipped directly to the customer and that Golberg was reimbursed. Schier also stated that he never received any compensation relating to this transaction. ("Rabin Bros.Transaction").

36. On August 2, 1984, Golberg purchased a tank from C.O. Bruce for

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[18] Although this exhibit substantiates Golberg's testimony regarding his purchase from Rabin Brothers, it fails to tie Schier to the transaction.

approximately $13,000.[19] Schier delivered the tank to Lane Dairy, a customer of Schier in El Paso, Texas. The sales price was $13,000 and freight was $2,000. Schier collected the $13,000, but never paid any money to Golberg relating to this transaction. Schier made no payment because he thought that the tank constituted his share of the profits in another deal; therefore, Schier did not think he owed anything to Golberg for sending the tank to his customer. ("Marrow Transaction").

37. Golberg testified that Schier also owes him $3,000 for freight charges incurred in transporting equipment to

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[19] Exhibits K and L document Golberg's purchase of equipment from C.O. Bruce.

Kansas on August 2, 1984. See Exhibit A. In response, Schier testified that he did not receive any equipment or money relating to this transaction and that he did not incur any obligations. ("Philadelphia Transaction").

38. On August 2, 1984, Golberg acknowledged that he owed Schier $1,000 in relation to a transaction involving State Center when he credited Schier's account for that amount. ("State Center Credit").

39. Also on August 2, 1984, Golberg gave Schier some air valves that he had stored in his inventory in Rochester, Minnesota. Schier then sold the air valves to Zarda Dairy for $2,600. Schier acknowledged owing Golberg $1,300 for the air valves. The remaining $1,300

constituted Schier's profit from the sale. ("Zarda Air Valves").

40. In 1984, Schier received $1,600 from Thomas Technical. Schier then gave this amount to Golberg who deposited it in his account on August 4, 1984 and credited Schier's account for that amount. ("Thomas Technical Credit").

41. On approximately September 15, 1984, Golberg credited Schier's account in the amount of $1,480 after Schier gave Golberg a check for that amount in connection with the Heritage transaction, thus acknowledging that he owed Schier that amount. ("Heritage Payment").

42. Some time in 1984, Golberg acknowledged that he owed Schier $7,000 for the sale to Golberg of a separator

from Clovis, New Mexico when he credited Schier's account for that amount. ("Clovis Credit").

43. Golberg testified that on September 20, 1984, he sold two cheese vats that he purchased from ERS Foods[20] to Schier for $5,000 (including freight). Schier had no recollection of this transaction and denied any liability. ("ERS Transaction").

44. Golberg also testified that on September 20, 1984, he sold Schier two compressors that he purchased from Mid-America at State Center, Iowa for

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[20] Golberg's purchase from ERS Foods is reflected in Exhibit HH, a copy of a check written by Golberg to ERS for $3,040. This exhibit fails to connect Schier with this transaction.

$5,000. According to Golberg, Schier took the equipment but never repaid him. Golberg also testified that Schier is indebted to him for $500, the salvage price of a separator that Golberg purchased and Schier kept.[21]

Schier had a different recollection of the first State Center transaction. With regard to the first transaction, Schier remembered that only one compressor was involved. Schier testified that it was shipped to Presidio, Texas and then to Arkansas and sold to someone named Gordon. Schier

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[21] Exhibits GG and BB, checks written by Golberg to Mid-America for $5,000 and $500 respectively, support Golberg's testimony about his purchases. However, they fail to tie Schier to either transaction.

stated that he was not directly involved in the transaction nor did he receive any money. Schier had no recollection of the State Center separator. ("State Center Purchases").

45. On September 20, 1984, Golberg financed the purchase of a compressor for Schier. Schier acknowledged that he owes Golberg $1,000 in relation to this transaction. ("Compressor Transaction").

46. Sometime in 1984, Golberg and Schier were engaged in the "Sunnyvale transaction." According to Schier, Golberg purchased approximately $50,000 worth of equipment. Schier and Golberg then sold the equipment to customers in California (a company called Zarda). In return, Golberg agreed to accept stock to National Veg-Tech Corporation, which he

was supposed to split evenly with Schier after deducting his own expenses. Schier never received any stock. GOLBERG explained that Schier [sic] was never given any stock because Golberg never received the stock, nor were there any profits derived from the transaction. In fact, Golberg sustained a loss of approximately $10,000, to which he did not ask Schier to contribute. ("Sunnyvale Transaction").

47. On January 8, 1985, Golberg financed the purchase of certain equipment in the Fairmont transaction, including a boiler and cheese press, which Schier then sold to a third party. He also paid the freight and loading costs to have the equipment moved. Schier did not reimburse Golberg for his investment and admitted that he owes

Golberg $7,500. ("Fairmont Transaction").

48. On August 20, 1985, Golberg credited Schier's account, thereby acknowledging that he owed Schier $10,000 in connection with the Schips Cheese Company transaction. ("Scheps Cheese Transaction").

49. On October 1, 1985, Golberg acknowledged that he owed Schier $1,000 in connection with the Wharton, Texas transaction when he credited Schier's account for that amount. ("Wharton Transaction").

50. On November 16, 1985, Golberg gave to Schier a check in the amount of $7,013.31 as a loan to pay Schier's American Express bill. See Exhibit TT.

Schier admitted that he did not give Golberg money to repay this debt; however, he stated that it was repaid by offsets (see finding no. 55). ("American Express Loan").

51. On January 28, 1986, Golberg wrote a check for $2,300 to Morning Glory Cheese Cooperative, Inc. ("Morning Glory") for the purchase of cheese vats. Considering this purchase a joint venture with Schier, Golberg gave the check to Schier so that Schier could give it to Morning Glory. See Exhibit S (check to Morning Glory written by Golberg). Golberg testified that when the deal fell through, he charged this amount to Schier. According to Schier, he made the purchase for Golberg with Golberg's check. Don Eaton picked up the equipment and took it to Golberg's shop. Schier

testified that he had no obligation to Golberg. ("Morning Glory Transaction").

52. On approximately February 16, 1986, Golberg transferred an ice cream freezer from Alabama to Schier. Golberg characterized this transfer a sale for which Schier never paid the $3,250 sales price. In contract, Schier testified that he received the ice cream freezer along with other equipment as his share of profits from a separate deal (the "Bernie Land" deal); thus this transfer did not result in any debt to Golberg. Further, Schier stated that the ice cream freezer was not worth $3,250. ("Ice Cream Freezer Transaction").

53. In June 1986, Golberg charged Schier's account $9,000 in connection with a Model 13004 separator that Schier

had taken to Equipment Engineering. Golberg later credited Schier's account in the same amount when he retrieved the separator from Equipment Engineering in December 1986. Golberg testified that he originally owned the separator. He considered the transfer of the equipment to Schier as a sale. When Schier could not resell the separator, Golberg retrieved it and credited Schier's account. Golberg stated that Schier gave him permission to credit Schier's account.

Schier, on the other hand, testified that he originally received the separator as profit from another deal (Lapps transaction); thus, the debit to his account by Golberg was improper. Moreover, when Golberg took the separator, he then owed Schier for taking

the equipment. Therefore, the credit to Schier's account was proper. ("Model 13004 Separator Transaction").

54. Golberg testified that on June 14, 1986, he sold cheese hoops to Schier for $5,000 who then delivered them to a cheese plant in El Paso, Texas. Schier recalled the transaction, but stated that he did not purchase the hoops from Golberg. Rather, he received the hoops as profit from another transaction. thus, he owes Golberg nothing. ("El Paso Hoops Transaction").

55. On approximately July 1, 1986, Golberg invested $2,500 in the purchase of a separator from Dairy State Cheese. See Exhibit O (check to Dairy State Cheese for $2,500). Schier then took the separator to Equipment Engineering to

have it refurbished. The machine was then sold to a third party. Golberg credited Schier's account in the amount of $6,000 for his participation in the transaction. Schier testified that he and Golberg agreed that if Schier refurbished the machine and delivered it to Virgil Johnson, the ultimate buyer, Golberg would pay Schier $9,500. Schier stated that the $2,500 payment represents money owed to Schier by Golberg. Also, the remaining $7,000 debt was used to pay off the American Express debt that Schier owed Golberg (see finding no. 50). Thus, according to Schier, he has no outstanding obligation relating to this transaction or the American Express loan. ("Dairy State Cheese Sale").

56. On July 8, 1987, Schier gave Golberg a homogenizer from Saint Mary's,

Kansas. Golberg then credited Schier's account $1,000. ("St. Mary's Credit").

57. On July 30, 1987 Golberg bought two tanks from Schier for $7,000. Golberg credited Schier's account for that amount. ("Fort Smith Credit").

58. In August 1987, Golberg purchased some equipment for $3,500 that Schier wanted from International Machine Exchange ("IME"). On August 1, 1987, Golberg wrote a check to IME as partial payment for the equipment. See Exhibit F. The remaining portion of the purchase price was off set by a debt owed by IME to Golberg. Golberg then debited Schier's account for $3,500. Schier acknowledged that he owes Golberg $3,500 in relation to this transaction; however, he quarrels with Golberg's characteriza-

tion of the transaction as a loan. Schier testified that he purchased equipment from Golberg rather than received money from him as a loan. ("IME Transaction").

59. In August 1987, Golberg purchased a compressor from Eaton Equipment Company for $2,500 on behalf of Schier. See Exhibit E (check from Golberg to Eaton Equipment). Schier acknowledged that he owes Golberg this amount. ("Eaton Equipment Transaction").

60. In 1987, Golberg sold a cottage cheese blender to Schier for $5,000. Schier agreed that he has not repaid this amount. ("Cottage Cheese Blender Transaction").

61. On December 6, 1987, Schier

purchased a compressor for $450 while in Dallas, Texas. Because he did not have the funds to pay for the machinery, he charged the purchase to Golberg's account. Schier acknowledged that he is obligated to Golberg for this amount. ("Dallas Compressor Transaction").

62. Any conclusion of law stated below, to the extent that it constitutes a finding of fact, is herein incorporated by reference as an additional finding of fact by the court.

Conclusions of Law

1. Any finding of fact stated above, to the extent that it constitutes a conclusion of law, is herein incorporated by reference as an additional conclusion of law by the court.

2. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a).

4. The parties have stipulated that Indiana law applies to all issues in this cause, including claims and counter-claims.

5. In Count One of plaintiff's complaint, he states a claim for tortious conversion, alleging that the defendant converted the separator to his own use. In response, Golberg argues that Schier entrusted the separator to Golberg when he asked Golberg repeatedly in April and June 1987 to sell it. Moreover, argues the defendant, Schier acquiesced in the removal and storage of the separator at

Separators after Golberg moved the machine there on June 23, 1987, thus giving Golberg authority to sell the equipment to Separators.

6. In Indiana, "'conversion is a tort involving appropriation of an owner's personal property to a tort-feasor's use and benefit. It occurs in exclusion and defiance of an owner's right and under an inconsistent claim of title.'" Centerre Bank, N.A. v. New Holland Div. of Sperry Corp., 832 F.2d 1415 (7th Cir. 1986) (quoting Plymouth Fertilizer Co. v. Balmer, 488 N.E.2d 1129, 1140 (Ind. Ct. App. 1986)); see also Autocephelous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, 717 F. Supp. 1374, 1399 n. 23 (S.D. Ind. 1989); Indiana & Michigan Electric Co. v. Terre Haute Industries, Inc., 507 N.E.2d 588,

610 (Ind.Ct. App. 1987); Yoder Feed Service v. Allied Pullets, Inc., 171 Ind. App. 692, 359 N.E.2d 602, 604 (1977).

7. To prove conversion, the plaintiff must demonstrate by a preponderance of the evidence that he had an "immediate, unqualified right to possession [of the property] based on a superior claim of title." Howard Dodge & Sons, Inc. v. Finn, 181 Ind. App. 209, 391 N.E.2d 638, 641 (1979), and that he did not consent to the exercise of dominion over the property by the defendant. Indiana & Michigan Electric Co., 507 N.E.2d at 610.

8. An intent to convert is not an essential element of the tort of conversion. Centerre Bank, 832 F.2d at 1415 ("Conversion is a strict liability

tort. The tort-feasor's intent and knowledge are irrelevant to his liability."); Coffel v. Perry, 452 N.E.2d 1066, 1069 (Ind. Ct. App. 1983).

9. Under Indiana law, in order to prove a claim for conversion, the plaintiff must show that he made a demand for the return of the property if the defendant legitimately came into possession of the property; when the defendant clearly converted the property to his own use, no demand is necessary. Centerre Bank, 832 F.2d at 1423; Yoder Feed Service, 359 N.E.2d at 605.

10. The parties do not dispute that after acquiring the separator from Western General, Schier either had legal title or had legal power and authority to transfer legal title under the Indiana

Commercial Code.

11. The plaintiff has failed to prove by a preponderance of the evidence that the defendant converted the property to his own use. The only probative evidence offered to support Schier's claim that Golberg took the separator without Schier's permission and then sold it to Separators against Schier's wishes is Schier's testimony. This evidence is met with the equally credible testimony of Golberg who testified that Schier asked Golberg to assist in finding a buyer for the machine and then gave him permission to move and sell the equipment to Separators. If Golberg's testimony is to be believed, the court would find that Golberg's [sic] possessed the machine with Schier's permission or, at the very least, that Schier acquiesced

in the sale of the machine.

The court has scoured the record to find other evidence corroborating either party's version of what occurred, but found no affirmative evidence to convince it that either side is more credible than the other. Moreover, the past custom and practice of Schier and Golberg tends to support Golberg's version of the transaction. In fact, just a few months prior to the disputed transaction, Schier permitted Golberg to retrieve a different separator from Equipment Engineering. Therefore, since the plaintiff had the burden to prove the conversion claim by a preponderance of the evidence, his claim must fail. Accordingly, the defendant is entitled to judgment in his favor as to Count One of the plaintiff's complaint.

12. In Count Two, the plaintiff asserts that he is entitled to treble damages pursuant to Ind. Code §34-4-30-1[22] because the defendant committed the following criminal acts: (1) criminal conversion (Ind. Code §35-43-4-3); (2) criminal mischief (Ind. Code § 35-43-1-2); (3) criminal trespass (Ind. Code # 35-43-2-2); and (4) theft/ receipt of stolen property (Ind. Code §35-43-4-2).

---

[22] Section 34-4-30-1 provides in relevant part:

> If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, or IC 35-42-3-4, the person may bring a civil action against the person who caused the loss for the following:
>
> (1) An amount not to exceed three (3) times the person's actual damages.
>
> (2) The costs of the action.
>
> (3) A reasonable attorney's fee.
>
> (4) Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through

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13. To recover under section 34-4-30-1, the plaintiff must establish the elements necessary to obtain a criminal conviction; however, a criminal conviction under Ind. Code § 35-43-1-1 et. seq. is not a condition precedent to recovery. Kopis v. Savage, 498 N.E.2d 1266, 1270 (Ind. Ct. App. 1986).

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(3) and are incurred by the person suffering loss to:
(A) Have the person suffering loss or an employee or agent of that person file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
(B) Provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.
(5) A reasonable amount to compensate the person suffering loss for time used to:
(A) File papers and attend court proceedings related to the recovery of a judgment under this chapter; or
(B) Travel to and from activities described in clause (A).

14. Although the plaintiff must prove the elements found in the criminal statutes, he need only establish a violation of each element by a preponderance of the evidence. Id.; DBC Capital Fund, Inc. v. Snodgrass, 551 N.E.2d 475, 478 (Ind. Ct. App. 1990).

15. The elements necessary to establish criminal conversion are those found in the criminal conversion statute.

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(6) Actual direct and indirect expenses incurred by the person suffering loss to compensate employees and agents for time used to:
   (A) File papers and attend court proceedings related to the recovery of a judgment under this chapter; or;
   (B) travel to and from activities described in clause (A).
(7) All other reasonable costs of collection.

Snodgrass, 551 N.E.2d at 478; Lambert v. Yellowbird, Inc., 496 N.E.2d 406, 410)Ind. Ct. App.), clarified, reh. den. in part, 498 N.E.2d 80 (Ind. Ct. App. 1986). Criminal conversion occurs when the defendant (1) knowingly or intentionally (2) exerts unauthorized control over property (3) of another person. Ind. Code § 35-43-4-3; Snodgrass, 551 N.E.2d at 478; Taylor v. State, 445 N.E.2d 1025 (Ind. Ct. App. 1983). The defendant must control property with the knowledge or firm belief that the control he is exerting is unauthorized. Moser v. State, 443 N.E.2d 68, 70 (Ind. Ct. App. 1982).

16. To establish that the defendant engaged in criminal mischief, the plaintiff must show that the defendant (1) knowingly or intentionally (2) caused

another to suffer pecuniary loss (3) by deception. Ind. Code § 35-43-1-2 (2); Bartruff v. State, 553 N.E.2d 485, 488 (Ind. 1990).

17. The elements necessary to prove criminal trespass are (1) the knowing or intentional (2) interference with the use or possession (3) of the property of another (4) without that person's consent. Ind. Code § 35-43-2-2.

18. To prove theft, the plaintiff must show that the defendant (1) knowingly or intentionally (2) exerted unauthorized control (3) over property of another (4) with the intent to deprive the other person of any part of the value or use of the property. Ind. Code § 35-43-4-2(a); Thomas v. State, 515 N.E.2d 880, 881 (Ind. Ct. App. 1987); Pennington

v. State, 459 N.E.2d 764, 767 (Ind. Ct. App. 1984).

19. A person acts "intentionally" if "when he engages in conduct, it is his conscious objective to do so ." Ind. Code § 35-41-2-2(a). An act is "knowingly" committed of the defendant is aware of the "high probability" of committing such act. Ind. Code §35-41-2-2(b). Under Indiana law, "a person's control over property of another person is 'unauthorized' if it is exerted: (1) [w]ithout the other person's consent; (2) [i]n a manner or to an extent other than that to which the other person has consented...." Ind. Code § 35-43-4-1(b)(1) & (2).

20. The plaintiff has failed to prove by a preponderance of the evidence

that the defendant knowingly or intentionally exerted unauthorized control over the separator. Although Schier testified that he never authorized Golberg to take and sell the separator and that Golberg knew this when he sold the equipment to Separators, Golberg's testimony that Schier expressly permitted him to take and sell the separator is equally credible. In addition, Golberg's conduct was consistent with the parties' past business practices. Without probative additional evidence to rebut Golberg's statements or substantiate Schier's claims, Schier's testimony fails to convince by a preponderance of the evidence that Golberg committed criminal conversion.

21. Schier's claim that Golberg engaged in criminal mischief must fail

for the same reasons. Schier has not proven by a preponderance of the evidence that Golberg knowingly or intentionally deceived Schier. According to Golberg, he was acting exactly as Schier had directed him to do. Moreover, by Golberg's account, Schier did not suffer any pecuniary damage when Golberg sold the separator because he and Golberg agreed that the separator would be sold for $22,000 to $25,000. Golberg located the buyer and moved the equipment, thereby earning the $3,000 commission, and Schier's debt to Golberg was reduced by $21,000. Schier's contrary testimony is no more credible than this version of events. Also, although Schier did not know that the separator had been sold, he did know that the separator had been moved to Separators. The fact that Golberg did not tell Schier immediately

that he had sold the separator or that he credited Schier's account is not crucial because such behavior was clearly consistent with past custom and practice. For these reasons, Schier's claim suffers from a fatal failure of proof.

22. Schier's contention that Golberg committed criminal trespass is also fatally flawed. For the reasons stated above, the court is not convinced by a preponderance of the evidence that Golberg knowingly or intentionally interfered with Schier's use of the separator without Schier's consent.

23. Likewise, Schier has not proven by a preponderance of the evidence that Golberg knowingly or intentionally exerted unauthorized control over the separator with the intent to deprive

Schier of its value or use. Indeed, Schier himself admitted that when Golberg first moved the separator, he informed Schier of his actions to which Schier did nothing until July 8, 1987.[23] In addition, although Golberg may have used poor judgment in failing also to inform Schier immediately of the sale, such failure is not unusual in light of the past practice of the two men. Also, as stated previously, Schier's testimony

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[23] Assuming Golberg's account as true, one can only guess as to why Schier changed his mind on July 8, 1987 about the sale to Separators. Golberg imputes a motive to Schier which involves Equipment Engineering. According to Golberg, Schier reneged on the sale because he realized that Separators was going to sell the reconditioned separator to Mitchell, the same customer with whom Equipment Engineering was trying to negotiate a sale of a separator. Not wanting to offend Behrens at Equipment Engineering or assist Lambert at Separators, Schier attempted to back out of the sale.

that Golberg was never given permission to take and sell the separator is met with the equally credible testimony of Golberg who stated that he acted pursuant to an agreement with Schier. Because the evidence presented by both parties is equally credible and because Schier has the burden of proving his case by a preponderance of the evidence, his claim must fail.

24. In conclusion, Schier has failed to prove by a preponderance of the evidence, that Golberg committed any criminal act that would entitle Schier to damages pursuant to Ind. Code §34-4-30-1. Accordingly, the defendant is entitled to judgment in his favor.

25. In his counterclaim against Schier, Golberg contends that Schier owes

him $83,363.20 in satisfaction of numerous outstanding debts. At trial, both parties testified as to their recollections about each transaction in which Golberg either debited or credited Schier's account. The parties agreed that Schier owes Golberg money in relation to some of the transactions. They also agreed that Golberg properly credited Schier's account and that those amounts were accurate. Although Golberg and Schier agree about some of the transactions, they dispute the facts surrounding most. The court will discuss those debts acknowledged by Schier, the credits that were properly given and then the disputed transactions.

26. At trial Schier acknowledged his debts on the following transactions:

(1) Fogg-Filler Transaction ($15,000);
(2) Zarda Air Valves ($1,300);
(3) Compressor Transaction ($1,000);
(4) Fairmont Transaction ($7,500);
(5) IME Transaction ($3,500);
(6) Eaton Equipment Transaction ($2,500);
(7) Cottage Cheese Blender Transaction ($5,000);
(8) Dallas Compressor Transaction ($450).

In addition, Schier denied owing Golberg any money relating to the Coffee Loan transaction. This denial was rebutted by Schier's own deposition testimony wherein he admitted that Golberg loaned him money in 1983 for a "coffee deal" in which Schier was involved. Accordingly, the court finds that Schier owes Golberg $1,000 for the Coffee Loan and that the total amount Schier admitted owing to Golberg equals $37,250.

27. The parties agree that the

following credits were proper:

(1) State Center Credit ($1,000);
(2) Thomas Technical Credit ($1,600);
(3) Heritage Payment ($1,480);
(4) Clovis Credit ($7,000);
(5) Scheps Cheese Transaction ($10,000);
(6) Wharton Transaction ($1,000);
(7) St. Mary's Credit ($1,000);[24]
(8) Fort Smith Credit ($7,000);
(9) The Separator ($21,000).

The total amount of credits due Schier equals $51,080.

28. Although they agreed about some of the transactions, Schier and Golberg

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[24] As discussed previously, Golberg credited Schier's account $21,000 after he took the separator from Equipment Engineering and sold it to Separators. Schier did not dispute that he is entitled to a credit for that amount. In his post-trial brief, Schier lists the undisputed credits. The court notes that Schier did not argue that he deserved a credit for $24,000. This raises the inference that Schier does not contest the $3,000 commission taken by Golberg.

disputed the facts surrounding most. The following transactions are disputed:

(1) Loan ($1,050);
(2) Strum Equipment and Freight Transaction ($10,000);
(3) Belliard Transaction ($38,279.89);
(4) Rabin Bros. transaction ($6,000);
(5) Marrow Transaction ($13,000);
(6) Philadelphia Transaction ($3,000);
(7) ERS Transaction ($5,000);
(8) State Center Purchases ($5,500);
(9) American Express Loan ($7,013.31);[25]
(10) Morning Glory Transaction ($2,300);
(11) Ice Cream Freezer Transaction ($3,250);
(12) Model 13004 Separator Transaction ($9,000 debit and $9,000 credit);
(13) El Paso Hoops Transaction ($5,000);
(14) Dairy State Cheese Sale ($2,500 debit and $6,000 credit);

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[25] Schier acknowledged this debt; however, he testified that it was repaid by offsetting a $7,000 debt owed to Schier by Golberg relating to the Dairy State Cheese Sale. Golberg testified that this debt has not been repaid.

(15) Sunnyvale Transaction.

29. With regard to these disputed transactions, the court finds that Golberg has failed to prove by a preponderance of the evidence that Schier owes him any money. As stated earlier, Schier and Golberg were equally credible. Unfortunately, neither party was able to produce additional probative evidence to support his version of events. Although Golberg offered exhibits relating to many of the transactions, most of those exhibits did not visibly relate to Schier in any way, least of all to show that Schier owed Golberg a debt arising from that specific transaction. Moreover, even if the exhibit did relate to Schier, Schier's explanation of the surrounding circumstances was just as credible as Golberg's testimony linking Schier to a

debt. In addition, Golberg's notebook, which specifically recorded Schier's debts to Golberg, does not provide any more assistance than Golberg's testimony itself and can be given no more weight. Indeed, Golberg admitted that neither the notebook nor exhibit WWWW, a summary of transactions between Golberg and Schier, recorded all the transactions that occurred during the period in which the disputed transactions took place. Without probative evidence to corroborate his testimony or shed doubt on Schier's explanation of the transactions, Golberg's claims with regard to such transactions are doomed. He simply failed to prove by a preponderance of the evidence that he is entitled to relief.

30. Because Golberg had failed to prove that Schier owes him money relating

to the disputed transactions, the court is left only with the debts and credits acknowledged by Schier to determine whether an outstanding debt exists. Further, because the credits exceed the admitted debts by $13,830, Golberg's entire counterclaim must fail. Accordingly, Schier is entitled to judgment on Golberg's counterclaim.

31. In conclusion, the court notes that it is not surprising that the parties find themselves in this position. In fact, the established course of dealing between Golberg and Schier (i.e., lack of accurate record-keeping, intertwined transactions, no formal method of accounting, failure to communicate or clearly define their understanding of the terms of each transaction, failure to pay or collect on

a regular basis, etc.) almost compelled the disputes forming the basis for their claims against each other. By relying almost solely on their own memories, memories that were bound to become dimmer with the passage of time and more confused by the growing number of details surrounding the increasing number of transactions in which they were involved, the parties should have anticipated that grave problems would eventually arise. Indeed, their course of dealing should have predicted the very outcome of this litigation. The fact that neither kept accurate and complete records, choosing instead to rely on their own and each other's memory to keep track of their business transactions has propelled them into litigation and prevented this court from making a complete assessment of what Schier and Golberg may owe each other.

After scouring the record to find evidence corroborating either person's accusation, the court discovered no affirmative evidence to convince it by a preponderance of the evidence that either Schier's or Golberg's claims are valid. Finding only different versions of the transactions that may be attributable to misrecollection, failure to recollect or some other motive such as anger or revenge, the court is unable to determine what really happened between Schier and Golberg. It is quite unfortunate that Schier and Golberg, formerly two very good friends, have chosen to resolve their problems through litigation, an inappropriate forum in this court's opinion, especially since their course of conduct prevents the court from resolving

their disputes for them.

It is so ORDERED this 1st day of August, 1990.

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted September 4, 1991*

May 11, 1992

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. JAMES B. MORAN, Chief District Judge**

CLARENCE SCHIER, Plaintiff-Appellant	§ Appeal from the United States District Court
Nos. 90-2991 and 2992	§ for the Southern District of Indiana, Indianapolis Division.
v.	§
JERRY GOLBERG, d/b/a GOLBERG DAIRY EQUIPMENT, and DAVID R. LAMBERT, Defendants-Appellees.	§ No. 88 C 210 Sarah Evans Barker, Judge.

ORDER

On February 24, 1988, the plaintiff-appellant, Clarence Schier, filed a

*After examination of the briefs,

two-count complaint against the defendants-appellees, alleging that the defendants tortiously converted his Model MRPX 314 commercial dairy separator to their own use when Golberg sold the separator to Lambert.[1] The court found in favor of the defendants, and the plaintiff appeals the district court's ruling. We affirm.[2]

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this court concluded that oral argument would not be helpful in its determination of the merits of the appeal. Therefore, the appeal has been submitted on the briefs and record. See Fed. R. App. P. 34(a); Circuit Rule 34(f).

** The Honorable James B. Moran, Chief Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

[1] The defendants filed several counterclaims against the plaintiff, none of which were successful. The defendants do not appeal their counterclaims.

[2] The plaintiff failed to present any

Nos. 90-2991 & 2992

I. FACTS

Schier and Golberg are both sole proprietors in the business of buying, trading, and selling used dairy processing equipment. Between 1983 and 1987, Schier and Golberg participated in approximately ten to fifteen transactions involving either the buying or trading of used dairy equipment with one another, and they also entered into joint ventures in which they would purchase equipment,

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arguments in his original brief on whether the district court erroneously dismissed his complaint against the defendants Lambert and Separators, Inc. The plaintiff's failure to argue with respect to the defendants Lambert and Separators, Inc. constitutes a waiver. Bugg V. International Union of Allied Industrial Workers of America, 674 F.2d 595, 598 n.4 (7th Cir. 1982); Cannon V. Teamsters & Chauffeur's Union, 657 F.2d 173, 177 (7th Cir. 1981). Therefore, we will only address Schier's arguments with regard to the defendant Golberg.

located buyers, sell the equipment and divide the profits or the remaining equipment. Schier and Golberg were frequently involved in more than one transaction at a time, and some transactions carried over into subsequent deals in terms of financing and payment.

In February, 1987, Schier acquired the Model 314 cream separator in question from Western General Dairies, Inc., of Ogden, Utah. The following month Schier transported the Model 314 separator to Equipment Engineering in Indianapolis, Indiana, to allow the company, who was interested in purchasing it, an opportunity to inspect the separator. After an inspection of the separator, Equipment Engineering elected not to buy it, but agreed to permit Schier to store machine on its premises while Schier attempted to find another buyer.

In June of 1987, when Schier told Golberg that the Model 314 separator was at Equipment Engineering and that Schier was interested in selling it, they spoke of $22,000 to $24,000 as a possible sales price. They discussed the potential sale of the separator on at least five separate occasions in June of 1987. Golberg claims that he told Schier he would like to receive a commission of $3,000 if he sold the separator and that Schier agreed to this amount. Golberg testified that Schier advised him that he could take possession of the separator in order to sell it. On June 23, 1987, Golberg took possession of the separator at Equipment Engineering and sold and delivered it to David Lambert's company, Separators, Inc., in Indianapolis, Indiana, and received $24,000 as payment for the sale. That same evening, Golberg

told Schier that he had transferred the separator from Equipment Engineering to Lambert's Separators, Inc., and alleges that Schier agreed to the transfer.[3] Golberg stated that he did not tell Schier that he had received payment for the separator because they were involved in four other transactions at the same time and that it was his intention to settle all his transactions with Schier one time.

In contrast, Schier alleges that he

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[3]Earlier in the year, Schier had left another separator at Equipment Engineering and authorized Golberg to pick it up. Deposition testimony of Robert Behrens, President of Equipment Engineering, related that his decision to permit Golberg to take the Model 314 was based on the fact that Golberg had been authorized by Schier to pick up similar equipment a short time previously. Schier himself testified that the two transactions took place, "almost exactly the same way...."

never gave Golberg permission to remove the separator from Equipment Engineering or sell it . On July 8, 1987 (approximately two weeks after Golberg sold the separator to Lambert's Separators, Inc.), Schier went to Separators, Inc. to retrieve the Model 314 and return it to Equipment Engineering. Schier, upon arrival, was informed by David Lambert that Separators, Inc. had completed the purchase of the separator and resold it to a third party. Lambert and Schier then called Golberg, and Schier told Golberg that he did not wish to sell the machine to Separators, Inc. Schier asserts that Golberg never admitted in the phone conversation that the sale to Separators, Inc. had been completed. In contrast, Golberg maintains that during the phone conversation he reminded Schier

that Schier had given him permission to sell the separator, and that he told Schier that the separator had been sold to Lambert for $24,000. Subsequently, Golberg credited Schier's account with $21,000, retaining $3,000 as commission for the sale of the separator.

Between July 8, 1987 and December, 1987, Schier and Golberg continued to do business with each other and at some time during this period Schier requested that Golberg reclaim the separator from Lambert, which Golberg refused to do so. In late December, 1987, Schier claims that Golberg admitted for the first time that he sold the separator to Lambert for $24,000, while Golberg maintains that between July 8, 1987 and January, 1988, he told Schier on at least six or eight occasions that he sold the machine to Lambert's Separators, Inc. for $24,000.

Moreover, Golberg claims that he told Schier he would give him $20,000 and requested that they settle all their accounts and resolve the situation. Schier declined Golberg's offer and brought suit.

At trial, testimony revealed that even though Schier and Golberg conducted numerous transactions, each failed to adequately document their transactions. Schier testified that he was not certain how much he and Golberg owed each other and that "bookkeeping problems basically is why we're here" in trial. Golberg also testified that while he kept his checks in a notebook to record his business transactions with Schier, he did not keep very accurate records of the

transactions.[4] The trial court found in favor of Golberg and the plaintiff appeals.

II. ISSUES FOR REVIEW

On appeal, the plaintiff alleges that: (1) the district court erred when determining that the plaintiff failed to prove by a preponderance of the evidence that Golberg converted the separator to his own use and that Schier failed to prove by a preponderance of the evidence that Golberg committed any criminal act that would entitle Schier to treble damages; (2) the trial court erred in accepting evidence that Golberg

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[4] Moreover, Schier admitted owing unpaid debts to Golberg for transactions and loans amounting to $37,250, subject to certain disputed offsets. On the other hand, Golberg testified that Schier owed him $83,363.20 as of the date of the trial.

introduced to support his Counterclaim; and (3) the district court erred in denying Schier the opportunity to depose an unavailable witness on the eve of trial.

III. DISCUSSION

A. The plaintiff Schier contends that the trial court erred in determining that he failed to prove by a preponderance of the evidence that the defendant Golberg converted the separator to his own use. "Under Fed. R. Civ. P. 52(a), in trial without a jury, '[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court judge the credibility of the witnesses.'" Hagge v. Bauer, 827 F.2d 101, 105 (7th Cir. 1987) (quoting Fed. R. Civ.P. 52(a)).

Nos. 90-2991 & 90-2992

Initially, Schier asserts that the district court erred in determining that both he and Golberg were equally credible witnesses. However, the Supreme Court has warned that an attack on a trial court's credibility determinations rarely succeeds, for "when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Anderson v. City of Bessemer City, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512 (1985); see Hagge v. Bauer, 827 F.2d at 105; see also United States v. Carrasco, 887 F.2d 794, 809 (7th Cir. 1989).

The only evidence offered to support

Schier's claim that Golberg converted the separator is Schier's testimony. However, Schier admitted that he and Golberg extensively discussed the possibility that they could sell the Model 314 for $22,000 to $24,000. In addition, Schier stated that Golberg told him sometime late in June, 1987, that Golberg had transported the Model 314 from Equipment Engineering and taken it to Separators, Inc. "in anticipation possibly of creating a sale of the machine." Schier also testified that he and Golberg discussed the fact that the Model 314 had been moved to Separators, Inc. so that it could be inspected prior to purchase. This testimony of Schier was essentially corroborated by Golberg. Moreover, both Schier and Golberg testified that they had a custom and practice of buying, selling, transporting

and bartering pieces of equipment on behalf of each other. In fact, earlier in 1987, Schier had left another separator at Equipment Engineering and authorized Golberg to pick it up from Equipment Engineering.

In determining that both Schier and Golberg were equally credible, the trial judge specifically found that both parties suffered from lapses of memory and did not have additional evidence to refresh their recollections or support their testimony. Given the dearth of documents or other objective evidence that could contradict either witness' story, we refuse to upset the district court's credibility determination. Thus, we agree with the trial judge's findings that Schier failed to prove by a preponderance of the evidence that Golberg converted the separator to his

own use. For the foregoing reasons, we also agree with the district court that Schier failed to prove by a preponderance of the evidence that Golberg committed any criminal act that would entitle him to treble damages.

B. The plaintiff Schier argues the district court erred in accepting Golberg's testimony about previous transactions between the two in support of Golberg's Counterclaim. Schier alleges that "under the laws [sic] of conversion, unrelated transactions cannot be considered." However, Schier has failed to cite any legal authority for this argument. "We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority are waived (even where those arguments raised constitutional issues.)" United States

v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991). Moreover, Schier failed to object to testimony at trial concerning the transactions discussed in Golberg's Counterclaim. Schier cannot claim error, as Federal Rule of Evidence 103(a)(1) precludes the finding of error on a ruling which admits evidence unless "a timely objection or motion to strike appears of record, setting the specific ground of objection."[5] Thus, by failing to object to the admission of the evidence and by failing to support his argument with pertinent authority, Schier has waived his opportunity to claim that

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[5] Indeed, Schier not only failed to object to the testimony about the transactions discussed in the Counterclaim, but he also testified about the same transactions in response to questioning by his own attorney.

any admission of such evidence constituted error.

C. Schier contends the district court erred in denying him the opportunity to depose an unavailable witness on the eve of trial because that witness' testimony would have substantiated his testimony and enabled him to establish his conversion charges. Schier intended to depose Vaughn Nielsen, the manager of Western General Dairies of Ogden, Utah, from whom Schier purchased the Model 314.

A district court's discovery ruling is reversed only on a clear showing of abuse of discretion. Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177, 183 (7th Cir. 1985). "Under the Seventh Circuit standard, an abuse of discretion occurs when one or more of these circumstances obtains: (1)

the record contains no evidence on which the court could rationally have based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; (4) the decision clearly appears arbitrary...." American Standard Inc. v. Pfizer, Inc., 828 F.2d 734, 739 (Fed. Cir. 1987) (citations omitted).

Schier fails to argue that the decision was based on an erroneous conclusion of law or that the decision was arbitrary. Instead, Schier's argument is that it was as abuse of the court's discretion because the refusal to allow the deposition severely prejudiced his case. However, prejudice to the plaintiff's case is not a valid ground for finding abuse of discretion. Moreover, the district court's ruling was

based on the fact that Schier made arrangements to depose Nielsen

> "at such a late date that it disadvantaged the defendants and their ability to prepare either for deposition or for the trial if that deposition proceeded, in that the request was made long after discovery deadlines had passed and at a time when it was unreasonable to require the defendants to participate in that sort of discovery."

Schier's efforts to depose Nielsen began February 1, 1990, a mere 20 days before trial. Despite Schier's knowledge of Nielsen's potentiality as a witness in this case from its inception, Schier did nothing to take Nielsen's deposition within the court's imposed time limits. Moreover, Schier waited through three scheduled trial dates and several discovery cut-off dates before scheduling Nielsen's deposition. Finally, the

proposed location for the deposition was Parowan, Utah, a remote town with no major cities or airports located nearby. Thus, the district court's finding that "it was unreasonable to require the defendants to participate in that sort of discovery" is not clearly erroneous.

IV. CONCLUSION

The decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

Date: May 11, 1992

Before: Honorable JOHN L. COFFEY,
Circuit Judge

Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable JAMES B. MORAN, *
Senior District Court Judge

Nos. 90-2991 and 90-2992

CLARENCE SCHIER,
Plaintiff-Appellant

v.

JERRY GOLBERG, doing business as GOLBERG DAIRY EQUIPMENT and DAVID R. LAMBERT,
Defendants-Appellees

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 88 C 210, Judge Sarah Evans Barker

This cause came before the court for decision on the record from the

above mentioned District Court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this Court entered this date.

* Hon. James B. Moran, Chief Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.
(1060-030690)

NOTICE REGARDING COSTS

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Fed. R. App. Proc. 39. COSTS

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. By local rule the court appeals shall fix the maximum rate at which the costs of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work

in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedes bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(As amended March 10, 1986, effective July 1, 1986)

Circuit Rule 39. COST OF PRINTING BRIEFS AND APPENDICES

The cost of printing or otherwise producing copies of briefs and appendices shall not exceed the maximum rate per page as established by the clerk of the court of appeals. If a commercial printing process has been used, a copy of the bill must be attached to the itemized and verified bill of costs filed and served by the party.

NOTE: If costs of printing or otherwise producing required documents are to be recoverable, copies of applicable printing bills must be attached to the bill of costs. An original and three copies of a bill of costs are required. Recovery for the costs of office overhead items, mailing, and author's alterations will NOT be allowed.

MAXIMUM RATES PER PAGE: (a) For costs of reproduction, whether prepared commercially or "in-house" $0.30 per page, per copy, plus reasonable charges for covers and binding;

(b) For commercial printing - $30 per page for the total run, including covers, binding, and any other special charges.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
- Chicago, Illinois 60604

June 15, 1992

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon.JAMES B. MORAN, Chief District Judge*

CLARENCE SCHIER, Plaintiff-Appellant,	§	Appeal from the United States District Court
Nos. 90-2991 and 90-2992 v.	§	for the Southern District of Indiana,
JERRY GOLBERG, doing business as GOLBERG DAIRY EQUIPMENT and DAVID R. LAMBERT, Defendants-Appellees.	§	Indianapolis Division.
	§	No. 88 C 210
	§	Sarah Evans Barker, Judge

O R D E R

Plaintiff-appellant filed a petition for rehearing on May 26, 1992. All of the judges on the original panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

*The Honorable James B. Moran, Chief Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX D

UNITED STATES CODE

28 U.S.C. §1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §1332. Diversity of citizenship; amount in controversy;costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States," as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

INDIANA STATUTES

IC 34-4-30-1. Damages for property loss caused by criminal act.

If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or

IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

(1) An amount not to exceed three (3) times the person's actual damages.

(2) The costs of the action.

(3) A reasonable attorney's fee.

(4) Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through (3) and are incurred by the person suffering loss to:

(A) Have the person suffering loss or an employee or agent of that person file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) Provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.

(5) A reasonable amount to compensate

the person suffering loss for time used to:

(A) File papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) Travel to and from activities described in clause (A).

(6) Actual direct and indirect expenses incurred by the person suffering loss to compensate employees and agents for time used to:

(A) File papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) Travel to and from activities described in clause (A).

(7) All other reasonable costs of collection.

IC 35-41-2-2. Culpability.

(a) A person engages in conduct "intentionally" if, when he engages

in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if, when he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

IC 35-43-1-2: Criminal mischief-- Institutional criminal mischief.

(a) A persons who:

(1) Recklessly, knowingly, or intentionally damages property of another person without his consent; or

(2)Knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person; commits criminal mischief, a class B misdemeanor. However, the offense is a class A misdemeanor if the pecuniary loss is at least two hundred fifty dollars [$250] but less than two thousand five hundred dollars

[$2,500], and a class D felony if: (i) the pecuniary loss is at least two thousand five hundred dollars [$2,500]; (ii) the damage causes a substantial interruption or impairment of utility service rendered to the public; or (iii) the damage is to a public record.

(b) A person who recklessly, knowingly, or intentionally damages:

(1) A structure used for religious worship;

(2) A cemetery or a facility used for memorializing the dead;

(3) A school or community center;

(4) The grounds:

(A) Adjacent to; and

(B) Owned or rented in common with;

a structure or facility identified in subdivision (1),

(2), or (3); or

(5) Personal property contained in a structure or located at a facility identified in subdivision (1), (2), or (3); without the consent of the owner, possessor, or occupant of the property that is damaged, commits institutional criminal mischief, a class A misdemeanor. However, the offense is a class D felony if the pecuniary loss is at least two hundred fifty dollars [$250] but less than two thousand five hundred dollars [$2,500], and a class C felony if the pecuniary loss is at least two thousand five hundred dollars [$2,500]. [IC 35-43-1-2, as added by Acts 1976, P.L. 148, §3; 1977, P.L. 340, §41; P.L. 326 1983, §1.]

IC 35-43-2-2. Criminal trespass.

(a) A person who:

(1) Not having a contractual interest in the property, knowingly or intentionally enters the real property of another person after having been denied entry by the other person or that person's agent;

(2) Not having a contractual interest in the property, knowingly or intentionally refuses to leave the real property of another person after having been asked to leave by the other person or that person's agent;

(3) Accompanies another person in a vehicle, with knowledge that the other person knowingly or intentionally is exerting unauthorized control over the

vehicle;

(4) Knowingly or intentionally interferes with the possession or use of the property of another person without the person's consent; or

(5) Not having a contractual interest in the property knowingly or intentionally enters the dwelling of another person without that person's consent;

commits criminal trespass, a Class A misdemeanor. However, the offense is a Class D felony if it is committed on a scientific research facility.

(b) A person has been denied entry under subdivision (a)(1) of this section when the person has been denied entry by means of:

(1) Personal communication, oral or written; or

(2) Posting or exhibiting a

notice at the main entrance in a manner that is either prescribed by law or likely to come to the attention of the public.

IC 35-43-4-2. Theft -- Receiving stolen property.

(a) A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony. However, the offense is a Class C felony if the fair market value of the property is at least one hundred thousand dollars ($100,000).

(b) A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen

property, a Class D felony. However, the offense is a Class C felony if the fair market value of the property is at least one hundred thousand dollars ($100,000).

IC 35-43-4-3. Criminal conversion.

A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a class A misdemeanor.